IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1965

No. 1221-B

FRANK MARKARIAN,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

REPLY BRIEF BY THE PETITIONER

This REPLY BRIEF BY THE PETITIONER rebuts and challenges all the contentions claimed in the Respondent's Memorandum in Opposition with new approach and with new statements not generally contained in the two preceding Documents of the Petitioner.

It seems too many attorneys for the Respondent in this and in other cases use their tricks-of-trade to win by all means. The former Commissioner Mortimer Caplin's inculation of "largeness of attitude" has not registered in some attorneys of the government.

All along by design or by simple naivety they have slurred on the principal condition—invalidism—of the dependent which gives rise and meaning to this case. Invalidism can be congenital. It can result from an accident. It may come about through biological change. Or ultimately it may result from the infirmities of old age. Young and old could become victim of it.

There was no invalidism in the *Bartsch* case. But here in this *Markarian* case the Tax Court mentioned it. The Court of Appeals also took notice of it. That is why this instant case is so different and distinguishable from that of *Bartsch* case as to impel one's sense of justice to treat it differently.

To lump together both cases because personal services were involved in each case would be to ignore the gravity of this case. That would be like hypothesizing assault and battery the same as murder because in both cases crimes were involved. From this significant standpoint the two lower courts erred.

Another irrelevant argument is the Respondent's generalization of "services" as if encompassing all types of individuals while all along the Petitioner has confined it only to invalid dependents. It is such diversion which has compelled the Petitioner to repeat his position more often than he would have liked.

Still another cliche argument drummed is about the "administrative difficulty." Such an argument might have had some merit in the *Bartsch* case where pleadings on both sides were based on generalities and where the Invalid Test was unknown. For the Respondent to use such an argument here as the principal factor would signify something seriously lacking in such a presentation.

Above statements are further substantiated by these remarks:

> You will find lawyers who want to fight cases to win when really we ought to lose them to just clarify the law. You will find *our people pressing a technical issue* sometimes when we really should not press that issue * * *.—Donald Bacon, Asst. Commissioner of Compliance Section, on Page 21 of New York University Twenty-Second Annual Institute on Federal Taxation.
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> To state it differently, litigation reflects a pathological condition in the administrative process. It indicates that the process has broken down, and that only the courts can provide some cure under the existing statutes. — Louis Eisenstein, formerly Senior Attorney of Office of Tax Legislative Counsel in Treasury Department, Page 23 of New York University Fifteenth Annual Institute on Federal Taxation.
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> In tax litigation I have rarely found that Treasury lawyers are particularly imbued with an intense desire to achieve a just disposition of a case * * *. Tax Administration here consists of *any argument* which a Treasury lawyer is not ashamed to make. — Attorney Louis Eisenstein in above volume, Page 38.
>
> The canons of legal ethics have a rule under which members of the bar are charged with supporting the decisions of the courts and generally speaking up affirmatively for the court position against criticism. — Dean J. Barron, Regional Commissioner of Revenue in N.Y.U. 21st Annual Institute on Federal Taxation, Page 34.

Despite the above connotation of benevolence, we have this sad condition in the Internal Revenue Service itself:

> Periodically, the Commissioner publishes a list of court decisions with which he does not "acquiesce." Short of the Supreme Court itself, no court of law from the Courts of Appeals through the Court of

> Claims, the United States District Courts and the Tax Court can escape the Commissioner's activated frown of disapproval. —
>
> Until the Commissioner decides to abandon his "non-acquiescence" either because of a change of policy or because of the sheer weight of adverse court decisions, the agents of the Internal Revenue Service will continue to ignore those edicts of courts of law which are favorable to the taxpayer. To this extent the Commissioner, for all practical purposes, stands above the courts and exercises his own judicial function. — Attorney Harry Balter in Marquette University Institute of Taxation, Vol. 9, P. 73.

Section 152 of the Internal Revenue Code of 1954 is a remedial statute. It is designed to give relief to those with dependents. Such statutes are to be construed and interpreted liberally and broadly on behalf of the taxpayers. The two lower courts and IRS failed to do so here. By restricting and confining its coverage they violated the spirit and the intent of the law.

The preceding statement is in harmony with this saying of former Commissioner of Internal Revenue Dana Latham: "Remedial statutes should be construed broadly and should be reasonably applied." Page 6 of N.Y.U. 22nd Annual Institute on Federal Taxation.

Though Congress has not defined "support," Black's Law Dictionary, 4th Edition, has done it in this manner: "Anything requisite to housing, feeding, clothing, health, proper recreation, vacation, traveling expenses, or other proper cognate purposes. *In re Vanderbilt's Estate,* 223 N.Y.S. 314, 316, 129 Misc. 605; and proper care, nursing, and medical attendance in sickness * * * ."

The limitation placed by the Respondent on the term "support" infringes and curtails the universal principle of justice. Such a restriction undermines the intent of

Congress. Such a deduction can be inferred even from this statement of Assistant Secretary of the Treasury Stanley S. Surrey in the Vital Speeches of the Day, December 15, 1965: "* * * Congress has taken a much broader approach. It has shaped our present income tax structure by giving recognition to a wide variety of these differences. * * * Congress also regards other factors, such as age * * *." Page 148.

Section 152 does not specify that direct expenses or that actual expenses incurred alone be used for items comprising the support test. Other types of expenses for necessary items valued and expressed in form of indirect expenses or equivalent market value can and should also be included.

The above statement is substantiated by the fact that the 1955 Tax Court ordered IRS to include lodging at its fair rental value, despite the presence of a regulation specifically barring such inclusion. *Blarek v. C. I. R.*, 23 T.C. 1037, and *Haynes v. C. I. R.* 1046.

If the great 1955 Tax Court could order and initiate a "new concept" of equivalent value or fair market value on an item arising indirectly and incidentally, this 1966 Supreme Court has all the right, all the power, all the inducement, all the logic, all the equity and justice to set aright the two lower courts and the Respondent by ordering services rendered to an invalid dependent be expressed at (minimum) market value as easily formalized and sampled in the Invalid Test. (See Pet. 14.)

Such a good course would be a natural extension of fair market value principle first enunciated in *Blarek* and *Haynes* cases. While the *Blarek* and *Haynes* underscore the equivalent property value, your extension would underscore the human value of the same principle of fair market value concept.

As in the *Blarek* case, the Respondent harps about the so-called "extreme difficulty" it would encounter in determining the value on services rendered to an invalid dependent. How does he know? He has not tried it. Even in 1957 when "services" were included in the regulations, he had designated no limitation whatsoever as to who could use "services." No attempt was ever made to limit services to any deserving group. Likewise, no attempt was ever made to define it, nor to formulate any sort of formula.

Such argument of administrative difficulty does not hold water nor could it withstand the illumination of light when services are limited to invalid dependents as spelled out in the proposed Invalid Test. Even without the semblance of proof at hand, the Appeals Court echoed and magnified this dubious and questionable cry of the Respondent. That lower court relied on shaky and untenable ground of "administrative difficulty" to render a wrong decision in favor of the Respondent.

IF "ADMINISTRATIVE DIFFICULTY" IS SUCH A CRUCIAL FACTOR AS CONTENDED BY THE COURT OF APPEALS AND BY THE RESPONDENT, HOW COME THE TAX COURT IN THIS CASE (42 T.C. 640) DID *NOT* MENTION IT DIRECTLY NOR INDIRECTLY ANYWHERE IN THE WHOLE CASE? Please note this truth for yourself. It all goes to prove that those two lower courts grievously erred in one way or another in their decisions against this representative taxpayer.

T. D. Regulation 6304 does not go far enough to make it fair and reasonable. Please compare these two related passages with each other:

> "Items of support furnished him in the form of services must be measured by the amount of expenses

> actually incurred. If the item of support furnished an individual is in the form of property or lodging, it will be necessary to measure the amount of such items of support in terms of its fair market value." (56 words)
>
> If the item of support furnished an individual is in the form of property or lodging or service rendered to an invalid, it will be necessary to measure the amount of such item of support in terms of its fair market value. (42 words)

The first passage represents Commissioner's own Rule 1.152-1(a)(2)(i) derived from T. D. 6304. It has two separate types of expenses—the actual on service and the equivalent fair market value on property or lodging. Here is discrimination which makes it null and void or unconstitutional.

The second passage is reconstructed by the Petitioner in such a way to to resolve properly the question in dispute. The type of expense is reduced to only one kind—the equivalent fair market value of property, lodging and services. Here we have uniformity and no discrimination as called for by the United States Constitution.

Strange as it may seem, sometimes some seemingly complicated problems have simple and just solutions. All that is needed is a combination of open mind and heart to allow the light of truth and equity and justice to penetrate.

Donations given to religious, educational and charitable organizations are tax deductible items. But contributions given to private persons and organizations are not deductible.

> The justification for exemption from taxation * * * is that these (charitable) organizations furnish the

community services that Federal, state or local government would otherwise be called upon to provide.

The exemption for religious organizations proceeds on a different premise—that they promote morality and thereby further the welfare of the state.—Jerome Hellerstein, Page 194 in Taxes, Loopholes and Morals.

Similarly, personal services rendered to an invalid dependent should be considered at its equivalent market value; while such services rendered among sound, normal and able members of a family or household be disallowed because of consideration and reciprocity inherent in latter situations.

The same philosophy behind the Public Policy of tax allowance for donations given to charitable organizations applies and controls in situations like this instant case. Had it not been for the Petitioner, the dependent would have become a public charge and liability, because she could not take care of herself, let alone attending to routine household chores.

The Petitioner's service was of exemplary nature. By caring for his Mother, he helped the community financially and morally. By giving him recognition in form of dependency allowance, the government would encourage other sons and daughters and relatives to do likewise for their own afflicted and disabled dependents.

The end result of such a desirable policy would be to lessen the influx of patients to convalescent homes, to hospitals, to governmental institutions of one kind or another. A chronic invalid would receive better care and attention and understanding among his relatives than if he is assigned elsewhere among many strangers where individuality is somewhat lost, and where the desire to live becomes dulled and meaningless.

It has now become obvious that IRS does not seem to be much concerned about the equity in this case and in its appertained regulation and statute. Its chief concern seems to be for its own ease and convenience of administration. Justice and fairness are pushed into the background. For that reason, you Honorable Justices of this Supreme Court, representing nearly two hundred million people of this Country, are the Guardians and Custodians of ethics and morality, of fairness and justice, of truth and principles. May those universal virtues emerge from this case.

In sum and substance, all these concised documents—the Petition, the Supplementary Petition and this Reply Brief by the Petitioner—lead to the inescapable conclusion that the decision of the lower court is wrong and in conflict with the Congressional intent and Public Policy, that it is wrong and in conflict with the Moral Laws of God and of man, that it is wrong and in conflict with the welfare and dignity of the taxpayer and that of the dependent.

The enormity of grievances attendant to this and similar cases call for not only the granting of this Writ of Certiorari, but better yet reversing summarily the decision below without the benefit of further written and oral arguments. Thank you.

Respecfully and gratefully submitted,

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